No. 94-1476

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

—v.—

M. OVETA PICKERING, as Special Administrator of the Estate of ARVEL PICKERING, Deceased, CHARLES ANDERSON, CARL OSTERMAN and DONALD DOSSETT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

PETITIONER'S REPLY BRIEF

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April 13, 1995

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M. OVETA PICKERING, as Special Administrator of the Estate of ARVEL PICKERING, Deceased, CHARLES ANDERSON, CARL OSTERMAN and DONALD DOSSETT,

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On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

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PETITIONER'S REPLY BRIEF

In its certiorari petition, Owens-Corning Fiberglas Corporation ("Owens-Corning") demonstrates that the $7.5 million punitive damages judgment is excessive under the Due Process Clause of the Fourteenth Amendment and urges the Court either to grant the petition to address that issue or to hold the petition pending disposition of *BMW of North America, Inc. v. Gore*, No. 94-896 (*cert. granted*, 115 S. Ct. 932 (1995)), which also presents issues

about the substantive due process limits on the size of a punitive damages award.

Respondents ("plaintiffs") have little to say about the substantive constitutional issues presented in this case and in *BMW*. Instead, they retort that the "decision [in *BMW*] will not affect" the judgment below, because Owens-Corning allegedly waived the constitutional excessiveness argument as a matter of Illinois law. [Cert. Opp. at 7-11.]

This "waiver" assertion is flatly wrong. Owens-Corning raised the due-process excessiveness issue in its post-trial motion [61a-64a[1]] and on appeal, and the Appellate Court of Illinois expressly addressed it on the merits in the decision from which certiorari is sought [23a, 25a-26a]. The Appellate Court's consideration of the substantive due process issue disposes of plaintiffs' "waiver" argument. *See, e.g., Raley v. Ohio*, 360 U.S. 423, 436 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it.").

Moreover, plaintiffs offer no explanation why the two acts of "waiver" they identify — Owens-Corning's not proffering proposed jury instructions to replace the pattern Illinois instructions, and its not presenting to the jury highly prejudicial evidence of prior punitive damages awards against it — should foreclose a constitutional challenge to the excessiveness of the punitive damages awards at issue here. While failure to present alternative jury instructions might waive an objection to the constitutionality of the instructions actually given, Owens-Corning's petition does not raise that separate *procedural* due process issue.

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1. Citations refer to the appendix to Owens-Corning's petition for certiorari.

The fact that the jury did not hear evidence of other punitive damages awards also is irrelevant to Owens-Corning's right to challenge the size of a particular award on appeal. Evidence of prior or potential punitive damages awards was not presented to the juries in the *BMW* case, *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), or *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), but the absence of that evidence did not prevent the Court from resolving the excessiveness challenges in *TXO* and *Haslip* or from granting certiorari on the substantive due process issue in *BMW*. In fact, under the Alabama punitive damages scheme upheld in *Haslip*, juries do *not* hear evidence of other punitive damages awards. That evidence is introduced only after the verdict, when a defendant files its post-trial motions. 499 U.S. at 21-22.

Finally, to the extent Illinois law on waiver is even relevant in light of the Appellate Court's having addressed the merits of the substantive due process argument, plaintiffs misstate that law in citing *Deal v. Byford*, 127 Ill. 2d 192, 537 N.E.2d 267, 271 (1989), for the alleged proposition that "the failure to tender an instruction waives *any* error in the punitive damages awards" [Cert. Opp. at 8]. *Deal* says no such thing. The Illinois Supreme Court ruled only that the defendants could not challenge the jury instructions and the consistency of the jury's answers to questions on the verdict form because the defendants had not properly objected or tendered their own proposals. But despite this waiver as to the jury instructions and the consistency of the answers on the verdict form, the Illinois Supreme Court nevertheless proceeded to address on the merits the defendants' "next" contention that "the jury's award of $25,000 in punitive damages to the plaintiff is excessive." 537 N.E.2d at 271-72. Plaintiffs' "waiver" argument thus is incorrect even under Illinois law.

In sum, plaintiffs' contrived "waiver" claim cannot shield the substantial constitutional issues presented in the petition either from plenary review or from a remand for reconsideration in light of the Court's forthcoming resolution of identical issues in *BMW*.

CONCLUSION

The Court therefore should grant Owens-Corning's petition for a writ of certiorari.

Respectfully submitted,

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